

MONTANA LEGISLATIVE HISTORY

Chapter 289 19 99

Bill H _____ S 365

Original bill & history ☒ c

H. Committee on Business & Labor

S. Committee on Labor & Employment

Hearing Date(s) 3-22 _____ C

Hearing Date(s) 2-9 _____ C

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Date Out 3-22 _____ C

Date Out 3-26

Did this bill originate in an interim committee? _____ Yes _____ No

Committee _____

Report _____

LEGISLATIVE HISTORIES SINCE 1997

The scope and depth of legislative committee minutes varies by year and by committee. If you would like additional information about a hearing, you may want to determine whether the hearing was recorded. In addition, some recent floor debates were also recorded. For information on accessing or purchasing these recordings, contact the Historical Society Archives at 406-444-4774.

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SB 365 Introduced by Mohl

LC0838 Drafter: McClure

Clarify the Scope of Construction Services Performed on a Public Works Contract for Which the Prevailing Rate of Wages must Be Paid;...

2/02	Introduced and 1st Reading		
2/02	Referred to Labor and Employment Relations		
2/09	Hearing		
2/17	Committee Executive Action--Bill Passed as Amended	6	3
2/17	Committee Report--Bill Passed as Amended		
2/20	2nd Reading Passed as Amended	48	0
2/23	3rd Reading Passed	48	0
	Transmitted to House		
3/02	Referred to Business and Labor		
3/22	Hearing		
3/22	Committee Executive Action--Bill Concurred	18	0
3/23	Committee Report--Bill Concurred		
3/27	2nd Reading Concurred	91	6
3/29	3rd Reading Concurred	83	17
	Returned to Senate		
3/30	Sent to Enrolling		
3/30	Returned from Enrolling		
3/31	Signed by President		
4/01	Signed by Speaker		
4/06	Transmitted to Governor		
4/09	Signed by Governor		
4/12	Chapter Number Assigned		
	Chapter Number 289		
	Effective Date: 7/01/1999 - All Sections		

SB 366 Introduced by Bartlett

LC0992 Drafter: Mitchell

Authorize Local Governments to Remove, Recycle, and Dispose of Abandoned and Deserted Mobile Homes;...

2/02	Introduced and 1st Reading		
2/02	Referred to Local Government		
2/10	Fiscal Note Requested		
2/11	Hearing		
2/15	Fiscal Note Received		
2/19	Committee Executive Action--Bill Passed as Amended	8	2
2/19	Committee Report--Bill Passed as Amended		
2/22	Fiscal Note Printed		
2/22	2nd Reading Passed	44	5
2/23	3rd Reading Passed	40	9
	Transmitted to House		
3/02	Referred to Local Government		
3/02	Revised Fiscal Note Requested		
3/02	Revised Fiscal Note Received		
3/02	Revised Fiscal Note Signed		
3/03	Revised Fiscal Note Printed		
3/11	Hearing		
3/24	Tabled in Committee		
	Died in Standing Committee		

1 Senate BILL NO. 365
2 INTRODUCED BY Janis A. Malt
3 (Primary Sponsor)

4 A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THE SCOPE OF CONSTRUCTION SERVICES
5 PERFORMED ON A PUBLIC WORKS CONTRACT FOR WHICH THE PREVAILING RATE OF WAGES MUST
6 BE PAID; AMENDING SECTIONS 18-2-401 AND 18-2-403, MCA; AND PROVIDING AN EFFECTIVE DATE
7 AND AN APPLICABILITY DATE."

8
9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

10
11 Section 1. Section 18-2-401, MCA, is amended to read:

12 "18-2-401. Definitions. Unless the context requires otherwise, in this part, the following
13 definitions apply:

14 (1) A "bona fide resident of Montana" is a person who, at the time of employment and
15 immediately prior to the time of employment, has lived in this state in a manner and for a time that is
16 sufficient to clearly justify the conclusion that the person's past habitation in this state has been coupled
17 with an intention to make it the person's home. Sojourners or persons who come to Montana solely in
18 pursuance of any contract or agreement to perform labor may not be considered to be bona fide residents
19 of Montana within the meaning and for the purpose of this part.

20 (2) "Commissioner" means the commissioner of labor and industry provided for in 2-15-1701.

21 (3) (a) "Construction services" means work performed by an individual in construction, heavy
22 construction, highway construction, and remodeling work.

23 (b) The term does not include:

24 (i) engineering, superintendence, management, office, or clerical work on a public works contract;

25 or

26 (ii) consulting contracts, contracts with commercial suppliers for goods and supplies, or contracts
27 with professionals licensed under state law.

28 (4) "Department" means the department of labor and industry provided for in 2-15-1701.

29 (5) "District" means a prevailing wage rate district established as provided in 18-2-411.

30 (6) "Heavy and highway construction wage rates" means wage rates, including fringe benefits

1 for health and welfare and pension contributions, that meet the requirements of the Employee Retirement
2 Income Security Act of 1974 and other bona fide programs approved by the United States department
3 of labor and travel allowance that are determined and established statewide for heavy and highway
4 construction projects, such as alteration or repair of roads, streets, highways, alleys, runways, trails,
5 parking areas, or utility rights-of-way.

6 (7) "Nonconstruction services" means work performed by an individual, not including
7 management, office, or clerical work, for:

8 (a) the maintenance of publicly owned buildings and facilities, including public highways, roads,
9 streets, and alleys;

10 (b) custodial or security services for publicly owned buildings and facilities;

11 (c) grounds maintenance for publicly owned property;

12 (d) the operation of public drinking water supply, waste collection, and waste disposal systems;

13 (e) law enforcement, including janitors and prison guards;

14 (f) fire protection;

15 (g) public or school transportation driving;

16 (h) nursing, nurse's aid services, and medical laboratory technician services;

17 (i) material and mail handling;

18 (j) food service and cooking;

19 (k) motor vehicle and construction equipment repair and servicing; and

20 (l) appliance and office machine repair and servicing.

21 (8) "Project location" means the construction site where a public works project involving
22 construction services is being built, installed, or otherwise improved or reclaimed, as specified on the
23 project plans and specifications.

24 ~~(8)~~(9) "Public works contract" means a contract for construction services or nonconstruction
25 services let by the state, county, municipality, school district, or political subdivision in which the total
26 cost of the contract is in excess of \$25,000.

27 (10) "Special circumstances" means all work performed at a facility that is built or developed for
28 a specific Montana public works project and that is located in a prevailing wage district that contains the
29 project location.

30 ~~(9)~~(11) (a) "Standard prevailing rate of wages" or "standard prevailing wage" means:

1 (i) the heavy and highway construction wage rates applicable to heavy and highway construction
2 projects; or

3 (ii) those wages, other than heavy and highway construction wages, including fringe benefits for
4 health and welfare and pension contributions, that meet the requirements of the Employee Retirement
5 Security Act of 1974 and other bona fide programs approved by the United States department of labor
6 and travel allowance that are paid in the district by other contractors for work of a similar character
7 performed in that district by each craft, classification, or type of worker needed to complete a contract
8 under this part. In each district, the standard prevailing rate of wages must be computed from a weighted
9 average wage rate based on all of the hours worked on work of a similar character performed in the
10 district unless the survey of employers in the district does not generate sufficient data. If the survey
11 produces insufficient data, the rate may be established by the use of other information or methods that
12 the commissioner determines fairly establish the standard prevailing rate of wages. The commissioner
13 shall establish by rule the method or methods by which the standard prevailing rate of wages is
14 determined. The rules must establish a process for determining if there is insufficient data generated by
15 a survey of employers in the district that requires the use of other methods of determining the standard
16 prevailing rate of wages. The rules must identify the amount of data that constitutes insufficient data and
17 require the commissioner of labor to use other methods of determining the standard prevailing rate of
18 wages when insufficient data exists. The alternative methods of determining the prevailing rate of wages
19 must provide for review and the incorporation of data from work of a similar character that is conducted
20 as near as possible to the original district.

21 (b) When work of a similar character is not being performed in the district, the standard prevailing
22 rate of wages, including fringe benefits for health and welfare and pension contributions, that meets the
23 requirements of the Employee Retirement Security Act of 1974 and other bona fide programs approved
24 by the United States department of labor and the rate of travel allowance must be those rates established
25 by collective bargaining agreements in effect in the district for each craft, classification, or type of worker
26 needed to complete the contract.

27 ~~(10)(12)~~ "Work of a similar character" means work on private or commercial projects as well as
28 work on public projects."
29

30 Section 2. Section 18-2-403, MCA, is amended to read:

"18-2-403. Preference of Montana labor in public works -- wages -- tax-exempt project -- federal

exception. (1) In every public works contract, there must be inserted in the bid specification and the public works contract a provision requiring the contractor to give preference to the employment of bona fide residents of Montana in the performance of the work.

(2) All public works contracts for construction services under subsection (1), except those for heavy and highway construction, that are conducted at the project location or under special circumstances must contain a provision requiring the contractor to pay:

(a) the travel allowance that is in effect and applicable to the district in which the work is being performed; and

(b) the standard prevailing rate of wages, including fringe benefits for health and welfare and pension contributions, that:

(i) meets the requirements of the Employee Retirement Income Security Act of 1974 and other bona fide programs approved by the United States department of labor; and

(ii) is in effect and applicable to the district in which the work is being performed.

(3) In every public works contract for heavy and highway construction, there must be inserted a provision to require the contractor to pay the heavy and highway construction wage rates established statewide for the project heavy and highway construction services conducted at the project location or under special circumstances.

(4) All public works contracts for nonconstruction services under subsection (1) must contain a provision requiring the contractor to pay:

(a) the travel allowance that is in effect and applicable to the district in which the work is being performed; and

(b) the standard prevailing rate of wages, including fringe benefits for health and welfare and pension contributions, that:

(i) meets the requirements of the Employee Retirement Income Security Act of 1974 and other bona fide programs approved by the United States department of labor; and

(ii) is in effect and applicable to the district in which the work is being performed.

(5) Transportation of goods, supplies, materials, and manufactured or fabricated items to or from the project location is not subject to payment of the standard prevailing rate of wages.

~~(4)~~(6) A contract, other than a public works contract, let for a project costing more than \$25,000

1 and financed from the proceeds of bonds issued under Title 17, chapter 5, part 15, or Title 90, chapter
2 5 or 7, on or after July 1, 1993, must contain a provision requiring the contractor to pay the standard
3 prevailing wage rate in effect and applicable to the district in which the work is being performed unless
4 the contractor performing the work has entered into a collective bargaining agreement covering the work
5 to be performed.

6 ~~{5}~~(7) A public works contract may not be let to any person, firm, association, or corporation
7 refusing to execute an agreement with the provisions described in subsections (1) through ~~(4)~~(6) in it,
8 provided that in public works contracts involving the expenditure of federal-aid funds, this part may not
9 be enforced in a manner as to conflict with or be contrary to the federal statutes prescribing a labor
10 preference to honorably discharged veterans of the armed forces and prohibiting as unlawful any other
11 preference or discrimination among citizens of the United States.

12 ~~{6}~~(8) Failure to include the provisions required by 18-2-422 in a public works contract relieves
13 the contractor from the contractor's obligation to pay the standard prevailing wage rate and places the
14 obligation on the public contracting agency."

15

16 NEW SECTION. Section 3. Effective date -- applicability. [This act] is effective July 1, 1999, and
17 applies to contracts entered into on or after [the effective date of this act].

18

- END -

INDEX TO BILLS IN COMMITTEE

June 30, 1999

- Committee: (S) Labor and Employment Relations -

04:59 PM

SB 365 SPONSOR: Mohl, Arnie SHORT TITLE: Clarify certain terms used in prevailing wage law for public contracts

REFERRED ON: 02/02/1999 HEARD ON: 02/09/1999

EXECUTIVE ACTION: 02/17/1999 Bill Passed as Amended -- VOTE: 6 - 3

FINAL DISPOSITION 04/12/1999 Chapter Number Assigned

SB 387 SPONSOR: Wilson, Bill SHORT TITLE: Prohibit employer from charging job application fee

REFERRED ON: 02/05/1999 HEARD ON: 02/11/1999

EXECUTIVE ACTION: 02/12/1999 Bill Passed as Amended -- VOTE: 9 - 0

FINAL DISPOSITION 04/22/1999 (H) Died in Standing Committee

SB 396 SPONSOR: Bartlett, Sue SHORT TITLE: Revise work comp premium rate for construction industry

REFERRED ON: 02/08/1999 HEARD ON: 02/11/1999

EXECUTIVE ACTION: 02/12/1999 Bill Passed as Amended -- VOTE: 9 - 0

FINAL DISPOSITION 03/23/1999 Chapter Number Assigned

SB 405 SPONSOR: Cocchiarella, Vicki SHORT TITLE: Participation in U system health plan and PERS subject to coll bargaining

REFERRED ON: 02/08/1999

FINAL DISPOSITION 03/01/1999 (S) Missed Deadline for General Bill Transmittal

SB 425 SPONSOR: Wilson, Bill SHORT TITLE: Require certified payrolls for prevailing wage projects

REFERRED ON: 02/10/1999 HEARD ON: 02/16/1999

TABLED ON: 02/17/1999

FINAL DISPOSITION 03/01/1999 (S) Missed Deadline for General Bill Transmittal

SB 432 SPONSOR: Thomas, Fred SHORT TITLE: Revise occupational disease act

REFERRED ON: 02/10/1999 HEARD ON: 02/16/1999

TABLED ON: 02/19/1999

FINAL DISPOSITION 03/01/1999 (S) Missed Deadline for General Bill Transmittal

SB 466 SPONSOR: Halligan, Mike SHORT TITLE: Allow occupational therapist to conduct evaluation

REFERRED ON: 02/12/1999 HEARD ON: 02/18/1999

EXECUTIVE ACTION: 02/19/1999 Bill Passed -- VOTE: 9 - 0

FINAL DISPOSITION 03/31/1999 Chapter Number Assigned

MINUTES

**MONTANA SENATE
56th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON LABOR AND EMPLOYMENT RELATIONS

Call to Order: By **CHAIRMAN TOM KEATING**, on February 9, 1999 at
3:18 P.M., in Room 413/415 Capitol.

ROLL CALL

Members Present:

Sen. Tom Keating, Chairman (R)
Sen. Fred Thomas, Vice Chairman (R)
Sen. Sue Bartlett (D)
Sen. Vicki Cocchiarella (D)
Sen. Alvin Ellis (R)
Sen. Bob Keenan (R)
Sen. Walter McNutt (R)
Sen. Bill Wilson (D)

Members Excused: Sen. Dale Berry (R)

Members Absent: None.

Staff Present: Gilda Clancy, Committee Secretary
Eddye McClure, Legislative Branch

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 365, 2/2/1999; SB 305,
2/2/1999

Executive Action: SB 202, SB 218, SB 223, SJR 6,
SB 229, SB 245, SB 242

SENATE COMMITTEE ON LABOR AND EMPLOYMENT RELATIONS

February 9, 1999

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HEARING ON SB 365

Sponsor: SEN. ARNIE MOHL, SD 39, Kalispell

Proponents: Mike Foster, Montana Contractor's Association
Ed Maronick, President, Helena Sand & Gravel,
Maronick Construction
Joel Long, JTL Group, Bozeman, Billings, Missoula

Opponents: Jerry Driscoll, Building Trades Association
Darrell Holzer, Montana State AFL-CIO
Christian Mackay, Montana Joint Heavy & Highway
Committee

Opening Statement by Sponsor:

SEN. ARNIE MOHL, SD 39, Kalispell, brought this bill which will clarify on-site project prevailing wages. The Attorney General made a ruling which was interpreted that if a person was on a construction job and had a special item made out of state, that company was to have the same prevailing wages as the contract job. This bill declares that prevailing wages pertain to 'on-site' projects. If you have a crushing plant which is off the site, prevailing wage goes into effect for that particular area. If you are building a building and have a specialized bathroom with items made someplace else, the item is not affected by prevailing wage.

Proponents' Testimony:

Mike Foster, Montana Contractor's Association, alleged SB 365 addresses a prevailing wage issue which surfaced last spring when Attorney General Joe Mazurek issued an opinion. **EXHIBIT(1)** The opinion states that under public works contract, employees making custom components for a construction project must be paid a prevailing wage in the area the on-site construction occurs regardless of where the materials were made. The opinion stated this prevailing wage requirement does not extend to the purchase of generic goods and supplies not designated specifically for that project. The Attorney General noted that our current statutes do not require that work involving construction services be done on a construction site itself. That silence in our laws was used as a basis for the opinion. He pointed to a statutory

definition of constructions services and determined the definition is broad enough to cover fabrication of items off the construction site for use on the specific project. The problem was, there was no end as to where that jurisdiction came, and to whether or not something would be under the requirements of prevailing wage. There were some disagreements about how that would be interpreted. For example, if something were manufactured in Japan and went to that site, there was considerable agreement among those who would have to take a look at this, whether the state agency or the contractors. This opinion would try to extend prevailing wage requirements across the borders of not only Montana, but possibly out of the country. Because of that problem, there was quite a bit of concern in the construction industry among contractors and also with the agencies which have the responsibility of enforcing prevailing wage requirements in our statutes. For 70 years the requirements for prevailing wage have been interpreted and enforced in a pretty consistent manner because it dates back to the passage of the Davis Bacon Act on a federal level, and then the state's efforts to mirror what had been done at that level as it applied to the state. In this particular area, the statutory silence is what had to be interpreted by the Attorney General. Meetings were held with Governor Racicot and Attorney General Mazurek, and the Departments of Labor and Administration. To everyone's credit, all those who had participated in that series of meetings expressed a deep willingness to find a workable solution in this matter. Eventually the Montana Department of Labor issued an interpretation of the Attorney General's opinion. That document has guided the construction industry for the past nine months. However, it is important to note the Attorney General's opinion carries the weight of law unless the courts overturn it or the legislature changes the law that's involved. The silence had to be addressed, otherwise the opinion stood as it is written. They have tried to take a fair and even-handed approach to developing this bill so that the manner in which that aspect and prevailing wage has been interpreted and enforced and administered by the agencies responsible for that over all these decades, it will continue to do that. This bill creates a status quo situation. He believes the Attorney General, Governor and Departments of Labor and Administration view this bill favorably. On page 2 there are definitions regarding project location and special circumstances. These definitions were developed to provide fair boundaries and limitations to the prevailing wage requirements. The application of those terms are shown on page 4 of the bill

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and there is a proposed effective date of July 1, 1999 to accommodate the beginning of a new fiscal year when contracts for public works projects will be signed.

Ed Maronick, President, Helena Sand & Gravel, Maronick Construction, said the ruling of the Attorney General created a tremendous amount of confusion with the suppliers. They supply gravel and crush it in a stockpile as a course of their business. The portion of it that would be sold to a project which has a Davis Bacon agreement on it would have had Davis Bacon wages. They may have crushed that gravel three months previously and it only took two hours or something like that. It would have been impossible to track and the paperwork involved would be as big as the project itself.

Joe Long, JTL Group, Bozeman, Billings, Missoula stated he agrees that when you are supplying materials to a job with pre-determined wages, quite often materials come out of a commercial source and are subject to labor agreements with different standards and you may be on the job for a very short time. The time and energy to track the wages on these jobs would be prohibitive and not do the public any good.

Opponents' Testimony:

Jerry Driscoll, Montana Joint Heavy & Highway Committee, was concerned about page 2 where it talks about 'special service'. He said it is so broad that unless you build a special facility in the district prevailing wage does not apply. He understands the Attorney General's opinion was very broad and needed to be fixed, but this goes so far that if you develop a facility and manufacture things for a particular job, when it crossed the county line for a prevailing wage district where the project was located, you would not have to pay the prevailing wage. This bill basically repeals prevailing wage on most jobs unless you are physically on that location.

Darrell Holzer, Montana State AFL-CIO, said they concur with the comments of **Mr. Driscoll** in terms that the language is too broad and it needs to be re-visited and clarified for everyone involved. He wanted to tell the Committee about a reference which originated from Missoula in which **Mr. Holzer** has first-hand familiarity with what facilitated that. Part of what generated

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the Attorney General's opinion is there were examples of prevailing wage work going on within the State of Montana. A contractor was having some materials fabricated off-site that could have very well and very easily been done on-site and the only logical explanation is they wanted a way around the prevailing wage rate, and quite frankly, that is problematic. The same people who are working on these projects are also the ones paying for these projects with their tax dollars. We need to keep in mind there are items on any project which will have to be ordered from vendors outside the parameters, and it was never anyone's intention to try to raise this kind of an issue on specialty items.

Christian McKay, Montana Joint Heavy & Highway Committee, mentioned they concur with the comments of **Mr. Driscoll** and **Mr. Holzer**. On page 4, section 5 says that the "transportation of goods, supplies, materials, and manufactured or fabricated items to or from the project location is not subject to payment of the standard prevailing rate of wages". A truck driver involved in the paving of highway construction who drives his or her truck from the hot plant to the road project every day, trip after trip until the project is completed, is not subject to prevailing wage. This language seems to mirror a court decision in Texas which stated this. That decision is now under appeal in the Federal Circuit Court and may be overturned. He urged a "do not pass".

{Tape : 1; Side : A; Approx. Time Counter : 17 - 33}

Questions from Committee Members and Responses:

SEN. ALVIN ELLIS said he did not believe it is **Jerry Driscoll's** intent to put a minimum wage on the cement manufacturer who sells to a highway project in different parts of Montana. He asked if **Mr. Driscoll** had amendments to take care of the problem?

Mr. Driscoll said he is working on amendments but does not have them ready. He has spoken to the proponents of the bill and quickly wrote, "special circumstances means all specialty work performed at the facility, not as a normal business practice for a specific public works project". If they didn't normally do it and began pre-fabricating something anywhere, they would have to pay prevailing wage rate.

SENATE COMMITTEE ON LABOR AND EMPLOYMENT RELATIONS

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SEN. SUE BARTLETT asked **Mike Foster** in reference to **Mr. McKay's** comments about the transportation if it was his intention to preclude a driver who isn't really involved in the project, like moving the material from the hot plant to the site of highway overlay. Would that truck driver be covered?

Mr. Foster responded their goal was to create language which would carry forth the status quo. With this language the truck driver would be treated the same as he was the past 50 years.

SEN. BARTLETT asked **SEN. MOHL** the same question.

SEN. MOHL responded the way it works now. If you had a town plant that sells to anyone, you would not have to pay according to the Davis Bacon Act. For the truck driver who hauls to the site, he would not have to be paid according to this act, but if he gets out of his vehicle and does anything on the project, then he falls under the Davis Bacon Act. If that gravel pit was designated only and is not a commercial pit, then they get paid the prevailing wage.

SEN. BARTLETT verbalized that is not what this language says.

John Andrew, Department of Labor, said he would agree with **SEN. MOHL'S** explanation of how the law is currently enforced and he believes that is what this language is saying as well.

SEN. BARTLETT still wasn't sure the language said that.

SEN. ELLIS asked **Mr. Andrew** if it makes any difference who that truck driver works for. In other words, if he is employed by the contractor, he clearly is covered by the Davis Bacon Act, is he not?

Mr. Andrew responded he believes that is correct.

SEN. ELLIS asked if he is under contract or freelances normally but is under contract, how would that be handled?

Mr. Andrew related what they would look at is whether that person is supplying material to the project or if they are working specifically on that project. If that individual were working on a project, for instance the batch plant **SEN. MOHL** described, they

are covered by the law. On the other hand, if they were coming from a commercial pit which was established for a reason other than that project, then he would say 'no'.

SEN. ELLIS said with regard to these questions, he assumes in every case the batch plant or pit is commercial.

Mr. Andrew answered that is correct. The distinction is the supplier of a commercial product versus something which is being done specifically for that project.

SEN. ELLIS inquired how it works if the truck driver is freelancing and he hauls wherever he can use his truck.

Mr. Andrew responded what they would look at is whether the individual who is hauling specifically on that project is receiving sufficient pay to equal the prevailing wage rates.

Closing by Sponsor:

SEN. MOHL contended with this bill. They are trying to eliminate the wide range of a problem with the opinion of the law. You could set up a shop and pre-cast or something, and you probably can, but can you do it more efficiently. If you had a pre-cast company who was set up downtown and makes a variety of materials, why would you want to set up and try to pre-cast on the project? It is not as efficient. So when you did the project you probably contacted the pre-cast company and had it completed. The pre-cast company would not fall under prevailing wage of the project because they are not only working for this project, but they are working for whoever else needs something. They are trying to confine this to an area to make sure people are getting the wages they are suppose to be getting. He believes this bill is well-written and will solve a lot of problems.

{Tape : 1; Side : B; Approx. Time Counter : 33 - 50}

HEARING ON SB 305

Sponsor: **SEN. FRED THOMAS, SD 31, Stevensville**

Proponents: **Mike Foster, Montana Contractor's Association**

DATE 2-9-99

[illegible]

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18-2-403^X, 411^X, 422^X
SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 1
DATE 2-9-99
BILL NO. SB365

VOLUME NO. 47

OPINION NO. 12

CONTRACTS - Site-specific nature of prevailing wage requirements applicable to public contracts;
COUNTIES - Site-specific nature of prevailing wage requirements applicable to public contracts;
LABOR RELATIONS - Site-specific nature of prevailing wage requirements applicable to public contracts;
PREVAILING WAGE - Site-specific nature of prevailing wage requirements applicable to public contracts;
ADMINISTRATIVE RULES OF MONTANA - Section 24.16.9002;
CODE OF FEDERAL REGULATIONS - 25 C.F.R. § 5.2(1) (1997);
MONTANA CODE ANNOTATED (1997) - Sections 18-1-102, 18-2-201, -401, -403, -406, -411, -421, -422, -431, -432;
MONTANA CODE ANNOTATED (1995) - Section 18-2-401;
MONTANA LAWS OF 1997 - Chapter 522;
MONTANA LAWS OF 1975 - Chapter 531;
MONTANA LAWS OF 1931 - Chapter 102;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 60 (1988);
UNITED STATES CODE - 25 U.S.C. § 276; 40 U.S.C. §§ 270a to 270f, 276a to 276a-7;
UNITED STATES CONSTITUTION - Article I, section 8, clause 3;
UNITED STATES STATUTES AT LARGE - 46 Stat. 1494, 48 Stat. 1011.

HELD: The prevailing wage requirements in Mont. Code Ann. § 18-2-403(2)(b) apply to fabrication of materials performed off-site by a contractor for installation or use at the site of construction under a public works contract. The prevailing wage district with respect to such off-site services is the district where the on-site construction occurs.

March 31, 1998

Mr. Robert L. "Dusty" Deschamps III
Missoula County Attorney
200 West Broadway, Courthouse
Missoula, MT 59802

Dear Mr. Deschamps:

You have requested my opinion concerning a question which I have phrased as follows:

Does the prevailing wage requirement in Mont. Code Ann. § 18-2-403 with respect to public works contracts apply to a construction contractor's off-site fabrication of items to be installed or used on-site by the contractor and, if so, are the prevailing wage rates those established for the district where the site is located or for the location where the off-site fabrication occurs?

I conclude that the prevailing wage requirements in § 18-2-403(2) apply to all "construction services" performed by the contractor under a "public works contract" regardless of whether carried out on or off the site of the involved construction and that the appropriate prevailing wage rate is the rate applicable in the prevailing wage district where the project is located.

I.

Missoula County routinely enters into construction contracts within the scope of the term "public works contracts" as defined in Mont. Code Ann. § 18-2-401(8). Such contracts are subject to the prevailing wage rate requirements in Mont. Code Ann. § 18-2-403(2):

All public works contracts under subsection (1) . . . must contain a provision requiring the contractor to pay:

(a) the travel allowance that is in effect and applicable to the district in which the work is being performed; and

(b) the standard prevailing rate of wages, including fringe benefits for health and welfare and pension contributions, that:

(i) meets the requirements of the Employee Retirement Income Security Act of 1974 and other bona fide programs approved by the United States department of labor; and

(ii) is in effect and applicable to the district in which the work is being performed.

Consistent with its obligations under that section and Mont. Code Ann. § 18-2-422, the county includes within a project's bid specifications and contract a provision requiring the contractor to pay prevailing wages. The Commissioner of Labor and Industry has established ten prevailing wage districts, with Missoula County located in District 2. Mont. Admin. R. 24.16.9002(6); see Mont. Code Ann. § 18-2-411(1) (requiring Commissioner to divide state into at least ten districts).

Among the contract documents prepared by Missoula County in connection with public works contracts is a "proposal for construction" describing generally the work to be performed and including a bid form on which the bidders must assign costs to discrete tasks identified by the county as necessary to complete the project. The completed proposal for construction is submitted under seal to the county. The county ordinarily must then award the contract to the lowest responsible bidder. Mont. Code Ann. § 18-1-102(1)(a)(i).

Construction contractors on occasion fabricate off-site items necessary to complete the work included within the bid. The off-site fabrication location will vary and may be outside the prevailing wage district within which the site itself is located or, conceivably, even outside Montana. The Commissioner of Labor and Industry has not adopted rules addressing this situation but has indicated her position that the Montana statute has the same geographical scope of work coverage as the Secretary of Labor's regulations defining the term "site of the work" under the Davis-Bacon Act. See 25 C.F.R. § 5.2(l) (1997). Under those rules, Davis-Bacon prevailing wage requirements apply to "the physical place or places where the construction called for in the contract will remain when work on it has been completed and . . . any other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the site." Id. § 5.2(l)(1); but see L.P. Cavett Co. v. United States Dep't of Labor, 101 F.3d 1111, 1114-15 (6th Cir. 1996) (refusing to defer to Department of Labor's regulations concerning "site of work" requirement insofar as they extend prevailing wage requirements to areas other than the actual project location); Ball, Ball & Brosamer, Inc. v. Reich, 24 F.3d 1447, 1452-53 (D.C. Cir. 1994) (same). You have concluded, in contrast, that the prevailing wage rates apply to all work which the involved contractor has agreed to undertake under a public works contract. You further believe the wages of employees performing such work must be determined by the rates established for the district in which the construction project itself is located.

II.

The current prevailing wage provisions in title 18, chapter 2, part 4 derive from 1931 Montana Laws chapter 102, which is known as Montana's "Little Davis-Bacon Act." Hunter v. City of Bozeman, 216 Mont. 251, 253, 700 P.2d 184, 185-86 (1985); 42 Op. Att'y Gen. No. 60 at 232, 233 (1988). The Davis-Bacon Act itself now applies expressly to the "construction, alteration, and/or repair, including painting and decorating, of public buildings or public works," by "mechanics and laborers employed directly upon the site of the work" (25 U.S.C. § 276a(a)) but, as initially enacted in 1931, described its scope of coverage as all contracts exceeding \$5000 for "the construction, alteration, and/or repair of any [federal] public buildings" (Act of Mar. 3, 1931, ch. 411, 46 Stat. 1494). In 1935 the federal statute was extended to "public works" and the phrase "employed directly upon the site of the work" was added. Act of Aug. 30, 1935, ch. 825, 48 Stat. 1011; see Ball, 24 F.3d at

1452 n.3. The 1935 amendments were designed to expand the federal law's scope by including all public works, not merely public buildings, where contracts exceeding \$2000 were let and expressly extending the federal law's reach to "painting and decorating." S. Rep. No. 1155, 74th Cong., 1st Sess. (1935); H.R. Rep. No. 1756, 74th Cong., 1st Sess. (1935). The amendments resulted from an investigation by the Senate Committee on Education and Labor that found substantial noncompliance with the Davis-Bacon Act and a need not only to clarify its coverage but also to strengthen its enforcement mechanisms. 79 Cong. Rec. 12,073 (1935) (statement of Sen. Walsh).

The 1931 Montana statute was comparable to the Davis-Bacon Act in its original form insofar as the state law used the terms "construction, repair and maintenance" in describing the general scope of the public contracts covered and did not limit the employees covered to those performing work directly on the project site. The legislature has never adopted the "employed directly upon the site of the work" language added to the federal act in 1935. A 1975 amendment to the Montana statute does require employers to post statements of prevailing wages "in a prominent and accessible site on the project or work area," but, as the disjunctive "or" suggests, the term "work area" may include areas other than a construction project itself. 1975 Mont. Laws ch. 531, § 1 (codified at Mont. Code Ann. § 18-2-406).

There is a second difference between the 1931 federal and state statutes relevant to the question whether the latter's prevailing wage requirement is limited to work on the job site. The 1931 Montana law defined the term "labor" to include "all services performed in the construction, repair or maintenance of all state, county, municipal and school work" and not to include "engineering, municipal, superintendence, management, or office or clerical work." 1931 Mont. Laws ch. 102, § 2. This definition was carried forward with little change until 1997. Mont. Code Ann. § 18-2-401(6) (1995) ("[l]abor means all services in excess of \$25,000 performed in the construction, maintenance, or remodeling work in a state, county, municipal, school district, or political subdivision project and does not include engineering, management, or office or clerical work"). The term "labor" did not appear elsewhere in the statute and was deleted in 1997 Montana Laws chapter 522. The substance of the definition nonetheless was retained under the 1997 amendments through addition of definitions for the terms "construction services," "nonconstruction services," and "public works contract." 1997 Mont. Laws ch. 522, § 1 (excluding from the definition of "construction services," inter alia, "engineering, superintendence, management, office, or clerical work on a public works contract"; excluding from the definition of "nonconstruction services," inter alia, "management, office, or clerical work"; and defining "public works contract" as "a contract for construction services or nonconstruction services let by the state, county, municipality, school district, or political subdivision in which the total cost of the contract is in excess of \$25,000").

As presently codified in § 18-2-403(2), the prevailing wage requirement extends to any "public works contract" without the limiting site-specific language of the Davis-Bacon Act. Although the 1931 legislature may have intended the state statute to have the same general scope as the federal act, both laws have undergone substantial modification over the nearly 70 years since their enactments and now bear little resemblance to one another except to the extent each is directed at requiring that certain minimum wage levels be paid for work under particular classes of government contracts. The 1997 amendments to the Montana statute, moreover, support a conclusion that the prevailing wage requirement has no work-situs limitation, since in defining "construction services" the amendments include "work performed by an individual in construction, heavy construction, highway construction, and remodeling work" without imposing such a restriction.

I recognize that the Commissioner of Labor and Industry has concluded the prevailing wage requirement extends only to construction services performed at the job site or nearby property. The Commissioner's interpretation of a statute committed to her agency's enforcement often is entitled to substantial deference. See Reno v. Koray, 515 U.S. 50, 60-61 (1995). Nevertheless, here a literal reading of § 18-2-403(2) does not support a job-situs limitation, and I therefore decline to defer to the Commissioner's construction of § 18-2-403(2)(b). See Dole v. United Steelworkers, 494 U.S. 26, 42 (1990) (deference not accorded agency interpretation where statute, read as a whole, indicated a contrary congressional intent). I cannot supply a restriction unsupported by the language of the law itself. Farmers Alliance Mut. Ins. Co. v. Holeman, 278 Mont. 274, 287, 924 P.2d 1315, 1323 (1996).

Finally, no reasonable dispute exists that a contractor's off-site fabrication of items for on-site installation constitutes "construction" within the scope of the term "construction services." Even on the most basic definitional level, such activity involves "[t]he process or art of constructing; the act of building; erection; the act of devising and forming; fabrication; composition." Webster's II: New Riverside Univ. Dictionary (1988) <<http://www.nbc-med.org/dictionary.html>>. It nonetheless must be emphasized that this opinion does not address the proper interpretation of the term "construction services" except in this specific context. I note that the definition of "construction services" excludes, inter alia, "contracts with commercial suppliers for goods and supplies" and that the term "subcontractor" as used in Mont. Code Ann. §§ 18-2-421, -422 and -432 is not defined. Questions over the reach of "construction services" in other situations may well demand careful factual analysis of the particular facts and the statute's language and purpose. Cf. J.M. Bateson Co. v. United States ex rel. Bd. of Trustees, 434 U.S. 586, 591-92 (1978) (the term "subcontractor" under the Miller Act, 40 U.S.C. §§ 270a-270f, encompasses only entities or persons having a direct contractual relationship with the prime contractor); E.D. Rich Co. v. United States ex rel. Indus. Lumber Co., 417 U.S. 116, 123-24 (1974) (scope of term "subcontractor" under the Miller Act); United States ex rel. Conveyor Rental & Sales Co. v. Aetna Cas. & Surety Co., 981 F.2d 448, 451-52 (9th Cir. 1992) (identifying

factors to be considered in distinguishing "subcontractors" from "materialmen" under the Miller Act); Robintech, Inc. v. White & McNeil Excavating, Inc., 218 Mont. 404, 407-08, 709 P.2d 631, 633 (1985) (rejecting contention that claimant was not "subcontractor" under bond issued pursuant to Mont. Code Ann. § 18-2-201 merely because it did not perform on-site work).

III.

The remaining aspect of your question requires interpretation of the term "work" in the phrase "the district in which the work is being performed." Mont. Code Ann. § 18-2-403(2)(b)(ii). Although it is possible to construe that term as referring to the services performed by individual employees, the more plausible interpretation is that it refers to the location of the project, or "work," to which the public works contract itself relates. Cf. Gaston v. Cooperative Farm Chem. Ass'n, 450 S.W.2d 174, 179 (Mo. 1970) ("[i]n considering the word 'work' as used in the statute we are concerned here with the work of installing a urea plant and are not considering it in the narrow sense of the particular phase of the work being done"); Bone v. Hackett, 185 P. 131, 132 (Ariz. 1919) ("[t]he words 'work,' 'all work,' 'such work,' and 'said work' doubtless have reference to the whole program of construction or improvement"). This interpretation is supported textually, since the legislature in the 1997 amendments chose to refer to the specific labor of individual employees in the definitions of "construction services" and "nonconstruction services" but left unchanged the term "work" in subsection (2)(b)(ii); i.e., had the legislature intended the location of a particular employee's work to be controlling, it presumably would have used the terms "construction services" and "nonconstruction services" in that subsection. Adopting a contrary interpretation additionally would raise the specter of different prevailing wage rates for similar job classifications under the same public works contract--a result not only increasing the administrative burden on the contracting parties and the Department but also potentially leading to labor unrest or conflict.

Your opinion request also inquires concerning whether the Montana prevailing wage statute may be applied to work performed outside this state. The Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, prohibits "a statute that directly controls commerce occurring wholly outside the boundaries of [that] State" (Healy v. Beer Institute, 491 U.S. 324, 336 (1989)), but this prohibition conceivably may not apply in a situation where, for example, a contractor or a subcontractor performs work under the public works contract both within and without Montana. The involved contract also may make the prevailing wage provisions applicable as a matter of private agreement, and such a consensual adjustment of the parties' rights and obligations ordinarily will be given effect. E.g., C.A. May Marine Supply Co. v. Brunswick Corp., 557 F.2d 1163, 1167 (5th Cir. 1977) ("[w]hen . . . parties to a contract have contact with more than one state, the parties are expected, and encouraged, to stipulate which state's substantive law will govern"); cf. Lix v. Kenney, 246 Mont. 426, 428-29, 804 P.2d 391, 392-93 (1991) (regardless of whether

DATE 2-9-99

SENATE COMMITTEE ON Labor

BILLS BEING HEARD TODAY: SB 365, SB 305

PLEASE PRINT

NAME	PHONE	REPRESENTING	BILL #	SUPPORT	OPPOSE
Mike Foster	442-4162	MT Contractors' Assoc.	SB 365 SB 305	✓ ✓	
Ed MARONICK	449-4007	MARONICK Const	SB 365 305	✓ ✓	
Phil Leslie	252-0148	Quality Concrete Co.	SB 365 SB 305	✓ ✓	
Phil Long	307 674 8210		SB 365 SB 305	✓ ✓	
Paul Thompson	(406) 723-8234	Gilman Const	SB 365 305	✓ ✓	
Jerry Driscoll	406-259-1655	Building Trades	SB 365 SB 365		✓ ✓

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

2

Labor

SB 365, SB 305

PLEASE PRINT

[illegible]

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

MINUTES

**MONTANA SENATE
56th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON LABOR AND EMPLOYMENT RELATIONS

Call to Order: By **SEN. BOB KEENAN**, on February 16, 1999 at 3:00 P.M., in Room 413/415 Capitol.

ROLL CALL

Members Present:

Sen. Tom Keating, Chairman (R)
Sen. Fred Thomas, Vice Chairman (R)
Sen. Sue Bartlett (D)
Sen. Dale Berry (R)
Sen. Vicki Cocchiarella (D)
Sen. Alvin Ellis (R)
Sen. Bob Keenan (R)
Sen. Walter McNutt (R)
Sen. Bill Wilson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Gilda Clancy, Committee Secretary
Eddy McClure, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 425, SB 432, 2/10/1999
Executive Action: SB 365, SB 271, SB 425

SENATE COMMITTEE ON LABOR AND EMPLOYMENT RELATIONS

February 16, 1999

PAGE 10 of 33

{Tape : 1; Side : A; Approx. Time Counter : 36 - 44}

EXECUTIVE ACTION ON SB 365

Motion: SEN. KEATING moved that SB 365 DO PASS.

Motion: SEN. COCCHIARELLA moved that THE AMENDMENT BE ADOPTED.

EXHIBIT(1) She explained amendment #1, stating that she moved on the first number in exhibit 1. There are separate amendments on the same page. If #1 passed, she would not motion to pass #2 as #1 is the one she preferred.

Discussion: SEN. KEATING asked SEN. COCCHIARELLA if the first amendment meant the prevailing wage by a contractor will apply within the district and the district which was bordering or touching it or is contiguous to it, would this mean they would end up with just two districts which would be subject to prevailing wage.

SEN. COCCHIARELLA responded the intention of the amendment is to not allow someone to cross a county line which could move you into another district. If there is actual transporting of something or work being done just across the line district to avoid paying prevailing wage, this amendment states that cannot be done.

SEN. WALTER MCNUTT expressed in actuality, that could involve than two districts. If you were in the middle of the state, you could use the district either side of you.

SEN. COCCHIARELLA responded that is correct.

Vote: Motion that AMENDMENT #1 BE ADOPTED carried 8-1 with SEN. ELLIS voting no.

Motion: SEN. KEATING moved that SB 365 DO PASS AS AMENDED.

Discussion: SEN. SUE BARTLETT affirmed in working with the contractors on this bill it is her understanding the contractor's intent is to restore the status quo in how prevailing wage was handled prior to the Attorney General's opinion of March 31, 1998

except for the piece which has to do with fabrication of items specifically for that project. She asked **John Andrew** if that was a correct statement.

Mr. Andrew responded his recollection of **SEN. MOHL'S** testimony was to put back to the status quo which existed prior to the issuance of that Attorney General's opinion.

SEN. BARTLETT referred to subsection 5 on page 4 and asked if **Mr. Andrew** thought this section was the status quo prior to the Attorney General's opinion.

Mr. Andrew thought this was the status quo, but there was a disagreement about this.

SEN. BARTLETT stated **SEN. COCCHIARELLA'S** amendment #2 dealt with that particular section and specified the transportation would not be subject unless the goods, supplies, materials, or items are produced under special circumstances which are defined on page 2, line 27. *{Tape : 1; Side : B; Approx. Time Counter : 44 - 50}* Special circumstances means worked performed at a facility which is built or developed for that specific project. If the Committee would consider amendment #2, would that bring them closer to the status quo on transportation prior to the Attorney General's opinion.

Mr. Andrew thought it would. That is very true for the highway end of things where they have familiarity. Pits which are open specifically for a project. They do not have familiarity in the building construction end of things where they haven't had any experience. If someone establishes a separate plant which is manufacturing a specialty item for a project, they haven't been faced how they would handle transportation. On the highways this change would bring the law more in line with the status quo prior to the Attorney General's opinion.

Motion: **SEN. BARTLETT** moved that **AMENDMENT #2 BE ADOPTED.**

Discussion: **SEN. KEATING** stated he is not comfortable putting another amendment on without the sponsor or a representative of the contractors present. He said this might be a potential for a floor amendment when the sponsor can debate it if the bill is

passed through the Committee. He would resist the motion for that reason.

SEN. COCCHIARELLA explained she did not offer the amendment because there is not absolute agreement in this language on this amendment. There is still concern that we are not returning to the status quo before the Attorney General's opinion. She is not sure how to address this. The language on page 4 on transportation is still not clear. She still believes there is a problem here.

Motion: **SEN. BARTLETT** withdrew her motion to adopt **AMENDMENT #2**.

Vote: Motion that **SB365 DO PASS AS AMENDED** with amendment #1 carried 6-3 with **SEN. BARTLETT, SEN. COCCHIARELLA, AND SEN. WILSON** voting no.

{Tape : 1; Side : B; Approx. Time Counter : 50 - 74}

EXECUTIVE ACTION ON SB 271

EXHIBIT(2) and **EXHIBIT(3)** were faxed to the Committee.

Discussion: **Eddye McClure** explained **EXHIBIT(4)**.

Motion: **SEN. KEATING** moved that **SB 271 DO PASS**.

Motion: **SEN. KEATING** moved that **THE AMENDMENTS BE ADOPTED**.

Discussion: **SEN. KEATING** said the first part of the amendments go along with what they heard in testimony regarding wrongful discharge. Those suggestions were drafted into an amendment.

Eddye McClure explained this is an avenue with how to deal with wrongful discharge.

SEN. KEATING alleged the last amendment is borne out of a situation of if an employer is not comfortable with giving information to his employee regarding firing him and says that his work was sloppy, if that employee files a wrongful discharge suit on that basis, the sloppy work is the employer's only defense. There may be a host of other reasons which are



SENATE STANDING COMMITTEE REPORT

February 17, 1999

Page 1 of 1

Mr. President:

We, your committee on Labor and Employment Relations report that Senate Bill 365 (first reading copy -- white) do pass as amended.

Signed: _____

Keating
Senator Tom Keating, Chair

And, that such amendments read:

1. Page 2, line 29.

Following: "location"

Insert: "or that is located in a contiguous prevailing wage district"

- END -

Committee Vote:

Yes 6, No 3.

SM

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DATE 2-16-99

[illegible]

Amendments to Senate Bill No. 365
1st Reading Copy

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 1
DATE 2-16-99
BILL NO. SB 365

Requested by Senator Vicki Cocchiarella

For the Senate Labor and Employment Relations Committee

Prepared by Eddye McClure
February 15, 1999

1. Page 2, line 29.

Following: "location"

Insert: "or that is located in a contiguous prevailing wage district"

2. Page 4, line 29.

Following: "wages"

Insert: "unless the goods, supplies, materials, or items are produced under special circumstances"

- END -

INDEX TO BILLS IN COMMITTEE

June 30, 1999

- Committee: (H) Business and Labor -

01:05 PM

- SB 319** **SPONSOR:** Holden, Ric **SHORT TITLE:** Allow marriage discounts for auto insurance
 REFERRED ON: 02/16/1999 **HEARD ON:** 03/09/1999
 TABLED ON: 03/25/1999
 FINAL DISPOSITION 04/22/1999 (H) Died in Standing Committee
-
- SB 331** **SPONSOR:** Shea, Debbie **SHORT TITLE:** Revise snowmobile, atv, & personal water craft sales, franchise, warranty law
 REFERRED ON: 02/16/1999 **HEARD ON:** 03/19/1999
 EXECUTIVE ACTION: 03/22/1999 Bill Concurred -- VOTE: 14 - 4
 FINAL DISPOSITION 04/22/1999 Chapter Number Assigned
-
- SB 347** **SPONSOR:** Stang, Spook **SHORT TITLE:** Revise insurance laws on small employer health reinsurance program
 REFERRED ON: 02/16/1999 **HEARD ON:** 03/02/1999
 EXECUTIVE ACTION: 03/02/1999 Bill Concurred -- VOTE: 15 - 0
 FINAL DISPOSITION 03/19/1999 Chapter Number Assigned
-
- SB 351** **SPONSOR:** Jergeson, Greg **SHORT TITLE:** Allow certain organization 2 cash prize casino nights per year
 REFERRED ON: 02/20/1999 **HEARD ON:** 03/11/1999
 EXECUTIVE ACTION: 03/11/1999 Bill Concurred -- VOTE: 18 - 0
 FINAL DISPOSITION 03/25/1999 Chapter Number Assigned
-
- SB 365** **SPONSOR:** Mohl, Arnie **SHORT TITLE:** Clarify certain terms used in prevailing wage law for public contracts
 REFERRED ON: 03/02/1999 **HEARD ON:** 03/22/1999
 EXECUTIVE ACTION: 03/22/1999 Bill Concurred -- VOTE: 18 - 0
 FINAL DISPOSITION 04/12/1999 Chapter Number Assigned
-
- SB 367** **SPONSOR:** Thomas, Fred **SHORT TITLE:** Revise and clarify new motor vehicle warranty laws
 REFERRED ON: 03/02/1999 **HEARD ON:** 03/18/1999
 EXECUTIVE ACTION: 03/23/1999 Bill Concurred as Amended -- VOTE: 15 - 3
 FINAL DISPOSITION 04/16/1999 Chapter Number Assigned
-
- SB 369** **SPONSOR:** Miller, Ken **SHORT TITLE:** Revise law relating to conversion of certain group insurance plans
 REFERRED ON: 02/22/1999 **HEARD ON:** 03/12/1999
 EXECUTIVE ACTION: 03/12/1999 Bill Concurred -- VOTE: 18 - 0
 FINAL DISPOSITION 04/06/1999 Chapter Number Assigned
-

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 56th LEGISLATURE - REGULAR SESSION

COMMITTEE ON BUSINESS AND LABOR

Call to Order: By CHAIRMAN BRUCE SIMON, on March 22, 1999 at
8:00 A.M., in Room 104 Capitol.

ROLL CALL

Members Present:

Rep. Bruce Simon, Chairman (R)
Rep. Bob Pavlovich, Vice Chairman (D)
Rep. Paul Sliter, Vice Chairman (R)
Rep. Joe Barnett (R)
Rep. Rod Bitney (R)
Rep. Sylvia Bookout-Reinicke (R)
Rep. Roy Brown (R)
Rep. David Ewer (D)
Rep. Carol C. Juneau (D)
Rep. Billie Krenzler (D)
Rep. Bob Lawson (R)
Rep. Gary Matthews (D)
Rep. Joe McKenney (R)
Rep. Carolyn Squires (D)
Rep. Jay Stovall (R)
Rep. Cliff Trexler (R)
Rep. Carley Tuss (D)

Members Excused: Rep. Gay Ann Masolo (R)

Members Absent: None.

Staff Present: Stephen Maly, Legislative Branch
Pati O'Reilly, Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 490, SB 13, SB 365,
3/3/1999

Executive Action: SB 13, SB 365, SB 126, SB 132,
SB 331, SB 399,

HEARING ON SB 365

Opening Statement by Sponsor: Senator Mohl, SD 39 introduced SB 365.

{Tape : 1; Side : A; Approx. Time Counter : 300 - 379}

Proponents' Testimony: Mike Foster, Montana Contractors Assn.
EXHIBIT(2) EXHIBIT(3)

{Tape : 1; Side : A; Approx. Time Counter : 379 - 436}

Paul Thompson, Gilman Const, Butte, MT.

{Tape : 1; Side : A; Approx. Time Counter : 436 - 470}

Gene Fenderson, Montana Heavy and Hiway Joint Comm.

{Tape : 1; Side : A; Approx. Time Counter : 470 - 481}

Carl Schweitzer, Montana Sub-Contractors Assn.

{Tape : 1; Side : A; Approx. Time Counter : 481 - 490}

Tom Hattersley, Montana Contractors Assn.

{Tape : 1; Side : A; Approx. Time Counter : 490 - 500}

{Tape : 1; Side : B; Approx. Time Counter : 0 - 9}

Opponents' Testimony: None

Questions from Committee Members and Responses: Reps. Ewer, Squires, and Simon questions witnesses.

{Tape : 1; Side : B; Approx. Time Counter : 9 - 161}

Closing by Sponsor: Senator Mohl closed SB 365. Rep. Bitney to carry on house floor.

{Tape : 1; Side : B; Approx. Time Counter : 161 - 200}

EXECUTIVE ACTION ON SB 365

Motion/Vote: REP. EWER moved that SB 365 BE CONCURRED IN. Motion carried unanimously.

{Tape : 1; Side : B; Approx. Time Counter : 200 - 248}

HEARING ON SB 271

Opening Statement by Sponsor: Senator Taylor, SD 37 introduced SB 271. EXHIBIT(4)

{Tape : 1; Side : B; Approx. Time Counter : 248 - 416}



HOUSE STANDING COMMITTEE REPORT

March 22, 1999

Page 1 of 1

Mr. Speaker:

We, your committee on **Business and Labor** report that **Senate Bill 365** (third reading copy -- blue) **be concurred in.**

Signed:

A handwritten signature in black ink, appearing to read "Bruce Simon".

Representative Bruce Simon, Chair

To be carried by Representative Rod Bitney

- END -

Committee Vote:
Yes 18, No 0.

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3
3

ATTORNEY GENERAL
STATE OF MONTANA

Joseph P. Mazurek
Attorney General



Department of Justice
215 North Sanders
PO Box 201401
Helena, MT 59620-1401

VOLUME NO. 47.

OPINION NO. 12

CONTRACTS - Site-specific nature of prevailing wage requirements applicable to public contracts;
COUNTIES - Site-specific nature of prevailing wage requirements applicable to public contracts;
LABOR RELATIONS - Site-specific nature of prevailing wage requirements applicable to public contracts;
PREVAILING WAGE - Site-specific nature of prevailing wage requirements applicable to public contracts;
ADMINISTRATIVE RULES OF MONTANA - Section 24.16.9002;
CODE OF FEDERAL REGULATIONS - 25 C.F.R. § 5.2(1) (1997);
MONTANA CODE ANNOTATED (1997) - Sections 18-1-102, 18-2-201, -401, -403, -406, -411, -421, -422, -431, -432;
MONTANA CODE ANNOTATED (1995) - Section 18-2-401;
MONTANA LAWS OF 1997 - Chapter 522;
MONTANA LAWS OF 1975 - Chapter 531;
MONTANA LAWS OF 1931 - Chapter 102;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 60 (1988);
UNITED STATES CODE - 25 U.S.C. § 276; 40 U.S.C. §§ 270a to 270f, 276a to 276a-7;
UNITED STATES CONSTITUTION - Article I, section 8, clause 3;
UNITED STATES STATUTES AT LARGE - 46 Stat. 1494, 48 Stat. 1011.

HELD: The prevailing wage requirements in Mont. Code Ann. § 18-2-403(2)(b) apply to fabrication of materials performed off-site by a contractor for installation or use at the site of construction under a public works contract. The prevailing wage district with respect to such off-site services is the district where the on-site construction occurs.

March 31, 1998

Mr. Robert L. "Dusty" Deschamps III
Missoula County Attorney
200 West Broadway, Courthouse
Missoula, MT 59802

Dear Mr. Deschamps:

You have requested my opinion concerning a question which I have phrased as follows:

Mr. Robert L. "Dusty" Deschamps III
March 31, 1998
Page 2

Does the prevailing wage requirement in Mont. Code Ann. § 18-2-403 with respect to public works contracts apply to a construction contractor's off-site fabrication of items to be installed or used on-site by the contractor and, if so, are the prevailing wage rates those established for the district where the site is located or for the location where the off-site fabrication occurs?

I conclude that the prevailing wage requirements in § 18-2-403(2) apply to all "construction services" performed by the contractor under a "public works contract" regardless of whether carried out on or off the site of the involved construction and that the appropriate prevailing wage rate is the rate applicable in the prevailing wage district where the project is located.

I.

Missoula County routinely enters into construction contracts within the scope of the term "public works contracts" as defined in Mont. Code Ann. § 18-2-401(8). Such contracts are subject to the prevailing wage rate requirements in Mont. Code Ann. § 18-2-403(2):

All public works contracts under subsection (1) . . . must contain a provision requiring the contractor to pay:

(a) the travel allowance that is in effect and applicable to the district in which the work is being performed; and

(b) the standard prevailing rate of wages, including fringe benefits for health and welfare and pension contributions, that:

(i) meets the requirements of the Employee Retirement Income Security Act of 1974 and other bona fide programs approved by the United States department of labor; and

(ii) is in effect and applicable to the district in which the work is being performed.

Consistent with its obligations under that section and Mont. Code Ann. § 18-2-422, the county includes within a project's bid specifications and contract a provision requiring the contractor to pay prevailing wages. The Commissioner of Labor and Industry has established ten prevailing wage districts, with Missoula County located in District 2. Mont. Admin. R. 24.16.9002(6); see Mont. Code Ann. § 18-2-411(1) (requiring Commissioner to divide state into at least ten districts).

Among the contract documents prepared by Missoula County in connection with public works contracts is a "proposal for construction" describing generally the work to be performed and including a bid form on which the bidders must assign costs to discrete tasks identified by the county as necessary to complete the project. The completed proposal for construction is submitted under seal to the county. The county ordinarily must then award the contract to the lowest responsible bidder. Mont. Code Ann. § 18-1-102(1)(a)(i).

Construction contractors on occasion fabricate off-site items necessary to complete the work included within the bid. The off-site fabrication location will vary and may be outside the prevailing wage district within which the site itself is located or, conceivably, even outside Montana. The Commissioner of Labor and Industry has not adopted rules addressing this situation but has indicated her position that the Montana statute has the same geographical scope of work coverage as the Secretary of Labor's regulations defining the term "site of the work" under the Davis-Bacon Act. See 25 C.F.R. § 5.2(l) (1997). Under those rules, Davis-Bacon prevailing wage requirements apply to "the physical place or places where the construction called for in the contract will remain when work on it has been completed and . . . any other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the site." *Id.* § 5.2(l)(1); but see L.P. Cavett Co. v. United States Dep't of Labor, 101 F.3d 1111, 1114-15 (6th Cir. 1996) (refusing to defer to Department of Labor's regulations concerning "site of work" requirement insofar as they extend prevailing wage requirements to areas other than the actual project location); Ball, Ball & Brosamer, Inc. v. Reich, 24 F.3d 1447, 1452-53 (D.C. Cir. 1994) (same). You have concluded, in contrast, that the prevailing wage rates apply to all work which the involved contractor has agreed to undertake under a public works contract. You further believe the wages of employees performing such work must be determined by the rates established for the district in which the construction project itself is located.

II.

The current prevailing wage provisions in title 18, chapter 2, part 4 derive from 1931 Montana Laws chapter 102, which is known as Montana's "Little Davis-Bacon Act." Hunter v. City of Bozeman, 216 Mont. 251, 253, 700 P.2d 184, 185-86 (1985); 42 Op. Att'y Gen. No. 60 at 232, 233 (1988). The Davis-Bacon Act itself now applies expressly to the "construction, alteration, and/or repair, including painting and decorating, of public buildings or public works," by "mechanics and laborers employed directly upon the site of the work" (25 U.S.C. § 276a(a)) but, as initially enacted in 1931, described its scope of coverage as all contracts exceeding \$5000 for "the construction, alteration, and/or repair of any [federal] public buildings" (Act of Mar. 3, 1931, ch. 411, 46 Stat. 1494). In 1935 the federal statute was extended to "public works" and the phrase "employed directly upon the site of the work" was added. Act of Aug. 30, 1935, ch. 825, 48 Stat. 1011; see Ball, 24 F.3d at

1452 n.3. The 1935 amendments were designed to expand the federal law's scope by including all public works, not merely public buildings, where contracts exceeding \$2000 were let and expressly extending the federal law's reach to "painting and decorating." S. Rep. No. 1155, 74th Cong., 1st Sess. (1935); H.R. Rep. No. 1756, 74th Cong., 1st Sess. (1935). The amendments resulted from an investigation by the Senate Committee on Education and Labor that found substantial noncompliance with the Davis-Bacon Act and a need not only to clarify its coverage but also to strengthen its enforcement mechanisms. 79 Cong. Rec. 12,073 (1935) (statement of Sen. Walsh).

The 1931 Montana statute was comparable to the Davis-Bacon Act in its original form insofar as the state law used the terms "construction, repair and maintenance" in describing the general scope of the public contracts covered and did not limit the employees covered to those performing work directly on the project site. The legislature has never adopted the "employed directly upon the site of the work" language added to the federal act in 1935. A 1975 amendment to the Montana statute does require employers to post statements of prevailing wages "in a prominent and accessible site on the project or work area," but, as the disjunctive "or" suggests, the term "work area" may include areas other than a construction project itself. 1975 Mont. Laws ch. 531, § 1 (codified at Mont. Code Ann. § 18-2-406).

There is a second difference between the 1931 federal and state statutes relevant to the question whether the latter's prevailing wage requirement is limited to work on the job site. The 1931 Montana law defined the term "labor" to include "all services performed in the construction, repair or maintenance of all state, county, municipal and school work" and not to include "engineering, municipal, superintendence, management, or office or clerical work." 1931 Mont. Laws ch. 102, § 2. This definition was carried forward with little change until 1997. Mont. Code Ann. § 18-2-401(6) (1995) ("[l]abor means all services in excess of \$25,000 performed in the construction, maintenance, or remodeling work in a state, county, municipal, school district, or political subdivision project and does not include engineering, management, or office or clerical work"). The term "labor" did not appear elsewhere in the statute and was deleted in 1997 Montana Laws chapter 522. The substance of the definition nonetheless was retained under the 1997 amendments through addition of definitions for the terms "construction services," "nonconstruction services," and "public works contract." 1997 Mont. Laws ch. 522, § 1 (excluding from the definition of "construction services," inter alia, "engineering, superintendence, management, office, or clerical work on a public works contract"; excluding from the definition of "nonconstruction services," inter alia, "management, office, or clerical work"; and defining "public works contract" as "a contract for construction services or nonconstruction services let by the state, county, municipality, school district, or political subdivision in which the total cost of the contract is in excess of \$25,000").

As presently codified in § 18-2-403(2), the prevailing wage requirement extends to any "public works contract" without the limiting site-specific language of the Davis-Bacon Act. Although the 1931 legislature may have intended the state statute to have the same general scope as the federal act, both laws have undergone substantial modification over the nearly 70 years since their enactments and now bear little resemblance to one another except to the extent each is directed at requiring that certain minimum wage levels be paid for work under particular classes of government contracts. The 1997 amendments to the Montana statute, moreover, support a conclusion that the prevailing wage requirement has no work-situs limitation, since in defining "construction services" the amendments include "work performed by an individual in construction, heavy construction, highway construction, and remodeling work" without imposing such a restriction.

I recognize that the Commissioner of Labor and Industry has concluded the prevailing wage requirement extends only to construction services performed at the job site or nearby property. The Commissioner's interpretation of a statute committed to her agency's enforcement often is entitled to substantial deference. See Reno v. Koray, 515 U.S. 50, 60-61 (1995). Nevertheless, here a literal reading of § 18-2-403(2) does not support a job-situs limitation, and I therefore decline to defer to the Commissioner's construction of § 18-2-403(2)(b). See Dole v. United Steelworkers, 494 U.S. 26, 42 (1990) (deference not accorded agency interpretation where statute, read as a whole, indicated a contrary congressional intent). I cannot supply a restriction unsupported by the language of the law itself. Farmers Alliance Mut. Ins. Co. v. Holeman, 278 Mont. 274, 287, 924 P.2d 1315, 1323 (1996).

Finally, no reasonable dispute exists that a contractor's off-site fabrication of items for on-site installation constitutes "construction" within the scope of the term "construction services." Even on the most basic definitional level, such activity involves "[t]he process or art of constructing; the act of building; erection; the act of devising and forming; fabrication; composition." Webster's II: New Riverside Univ. Dictionary (1988) <<http://www.nbc-med.org/dictionary.html>>. It nonetheless must be emphasized that this opinion does not address the proper interpretation of the term "construction services" except in this specific context. I note that the definition of "construction services" excludes, inter alia, "contracts with commercial suppliers for goods and supplies" and that the term "subcontractor" as used in Mont. Code Ann. §§ 18-2-421, -422 and -432 is not defined. Questions over the reach of "construction services" in other situations may well demand careful factual analysis of the particular facts and the statute's language and purpose. Cf. J.M. Bateson Co. v. United States ex rel. Bd. of Trustees, 434 U.S. 586, 591-92 (1978) (the term "subcontractor" under the Miller Act, 40 U.S.C. §§ 270a-270f, encompasses only entities or persons having a direct contractual relationship with the prime contractor); F.D. Rich Co. v. United States ex rel. Indus. Lumber Co., 417 U.S. 116, 123-24 (1974) (scope of term "subcontractor" under the Miller Act); United States ex rel. Conveyor Rental & Sales Co. v. Aetna Cas. & Surety Co., 981 F.2d 443, 451-52 (9th Cir. 1992) (identifying

factors to be considered in distinguishing "subcontractors" from "materialmen" under the Miller Act); Robintech, Inc. v. White & McNeil Excavating, Inc., 218 Mont. 404, 407-08, 709 P.2d 631, 633 (1985) (rejecting contention that claimant was not "subcontractor" under bond issued pursuant to Mont. Code Ann. § 18-2-201 merely because it did not perform on-site work).

III.

The remaining aspect of your question requires interpretation of the term "work" in the phrase "the district in which the work is being performed." Mont. Code Ann. § 18-2-403(2)(b)(ii). Although it is possible to construe that term as referring to the services performed by individual employees, the more plausible interpretation is that it refers to the location of the project, or "work," to which the public works contract itself relates. Cf. Gaston v. Cooperative Farm Chem. Ass'n, 450 S.W.2d 174, 179 (Mo. 1970) ("[i]n considering the word 'work' as used in the statute we are concerned here with the work of installing a urea plant and are not considering it in the narrow sense of the particular phase of the work being done"); Bone v. Hackett, 185 P. 131, 132 (Ariz. 1919) ("[t]he words 'work,' 'all work,' 'such work,' and 'said work' doubtless have reference to the whole program of construction or improvement"). This interpretation is supported textually, since the legislature in the 1997 amendments chose to refer to the specific labor of individual employees in the definitions of "construction services" and "nonconstruction services" but left unchanged the term "work" in subsection (2)(b)(ii); i.e., had the legislature intended the location of a particular employee's work to be controlling, it presumably would have used the terms "construction services" and "nonconstruction services" in that subsection. Adopting a contrary interpretation additionally would raise the specter of different prevailing wage rates for similar job classifications under the same public works contract—a result not only increasing the administrative burden on the contracting parties and the Department but also potentially leading to labor unrest or conflict.

Your opinion request also inquires concerning whether the Montana prevailing wage statute may be applied to work performed outside this state. The Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, prohibits "a statute that directly controls commerce occurring wholly outside the boundaries of [that] State" (Healy v. Beer Institute, 491 U.S. 324, 336 (1989)), but this prohibition conceivably may not apply in a situation where, for example, a contractor or a subcontractor performs work under the public works contract both within and without Montana. The involved contract also may make the prevailing wage provisions applicable as a matter of private agreement, and such a consensual adjustment of the parties' rights and obligations ordinarily will be given effect. E.g., C.A. May Marine Supply Co. v. Brunswick Corp., 557 F.2d 1163, 1167 (5th Cir. 1977) ("[w]hen . . . parties to a contract have contact with more than one state, the parties are expected, and encouraged, to stipulate which state's substantive law will govern"); cf. Lix v. Kenney, 246 Mont. 426, 428-29, 804 P.2d 391, 392-93 (1991) (regardless of whether

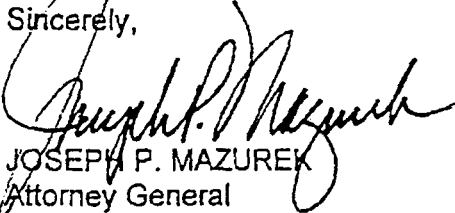
Mr. Robert L. "Dusty" Deschamps III
March 31, 1998
Page 7

the Commissioner of Labor and Industry had adopted prevailing wage rates properly, employer was bound contractually to pay those rates). Because of the possible factual variation and its effect on any determination concerning application of the prevailing wage provisions as to work performed outside Montana, the extraterritoriality issue is inappropriate for resolution in this opinion.

THEREFORE, IT IS MY OPINION:

The prevailing wage requirements in Mont. Code Ann. § 18-2-403(2)(b) apply to fabrication of materials performed off-site by a contractor for installation or use at the site of construction under a public works contract. The prevailing wage district with respect to such off-site services is the district where the on-site construction occurs.

Sincerely,



JOSEPH P. MAZUREK
Attorney General

jpm/crs/dm



DEPARTMENT OF LABOR AND INDUSTRY

COMMISSIONER'S OFFICE

EXHIBIT 3

DATE 3/22/99

SB 365

MARC RACOT, GOVERNOR

R.O. BOX 1728

STATE OF MONTANA

TELEPHONE: (406) 444-3855

FAX: (406) 444-1396

TDD: (406) 444-0832

HELENA, MONTANA 59614-1728

May 6, 1998

Re: Prevailing Wage

Interested persons:

As many of you are aware, the Attorney General issued an opinion on March 31st of this year concerning the Montana Prevailing Wage law. The issue that was resolved was fairly narrow and interpreted our prevailing wage law to apply to construction services by a contractor both on and off the actual work site. 47 AG Op. 12. The result of that opinion is uncertainty with regard to coverage of the prevailing wage law. Contractors, public contracting agencies and organized labor have provided input to this department and expressed their respective concerns over the Department's interpretation of the prevailing wage law in light of the AG opinion. In an attempt to address the concerns voiced by the various groups and to resolve some of the uncertainties, the Department is issuing this interpretive letter for general guidance purposes. A rule making procedure will follow shortly.

A number of concerns were voiced regarding matters such as whether suppliers producing a specific item for a particular project are subject to coverage under the prevailing wage laws. The Montana prevailing wage law specifically excludes "contracts with commercial suppliers for goods and supplies..." Section 18-2-401(3) (b) (ii), MCA. The Department interprets "commercial supplier" to include, a person, firm or entity that regularly furnishes goods and supplies to the public or to a particular sector of industry. The term includes both retail and wholesale operations, but does not include a person, firm or entity that limits its sales or production output from any single source or place of operation for use solely in the performance of public works contracts. For example, when a contractor sets up a new gravel pit for use in prevailing wage jobs, the requirement to pay prevailing wage is implicated in the operation of that pit.

The term "goods and supplies" include tangible items, merchandise, raw materials or finished goods that are produced or manufactured for use or incorporation in construction projects. The term includes items produced or manufactured to a standard size, grade or dimension as well as items that are specially manufactured or produced on a made to order basis. For example, items such as, but not limited to, pre-manufactured building trusses, concrete and pre-cast bridge beams would be included as goods and supplies.

Commercial suppliers are not subject to Montana's prevailing wage laws unless the commercial supplier becomes a contractor on a public works project. For example, when a commercial supplier of cabinets acts as a commercial supplier by building the cabinets at its place of business

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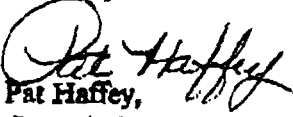
and then installs the cabinets, the commercial supplier became a contractor subject to the prevailing wage requirements when installing the cabinets.

When the goods and supplies are of a special nature such as concrete which requires a particular mode of delivery, the time spent delivering the goods or supplies is not covered by the prevailing wage law when undertaken by a commercial supplier. Delivery of concrete to a particular location where forms are located or a paving machine is working is merely incidental to the delivery of the goods and supplies. That is not to say, however, that a commercial supplier cannot ever become a contractor. As in the past, time spent shoveling concrete into forms, screeding and finishing the concrete, requires payment of prevailing wage.

A second issue left unresolved by the AG opinion pertained to extraterritoriality. The Department is without authority to enforce the prevailing wage requirements outside of Montana. Although the Department is not able to enforce the prevailing wage law outside of Montana, the requirement that a public works contract contain a provision for the payment of prevailing wages leaves open the prospect of a contractual obligation to pay the prevailing rate of wages. *Section 18-2-403, MCA*. The Department will take into consideration the purpose of the prevailing wage law including the protection of local labor markets in evaluating any enforcement activities or contract recommendations dealing with this issue. The Department's position is that the prevailing wage requirements should not be easily circumvented by simply removing part of the construction services to a site outside of this state.

It is anticipated that this general guidance will resolve only some of the questions contractors, public contracting agencies and labor has following the AG opinion. Additional guidance may be issued as further inquiries develop.

Sincerely,


Pat Haffey,
Commissioner

HOUSE OF REPRESENTATIVES

BUSINESS AND LABOR COMMITTEE

ROLL CALL

DATE 3/22/99

NAME	PRESENT	ABSENT	EXCUSED
Chairman Bruce Simon	X		
Rep. Paul Sliter	X		
Rep. Bob Pavlovich	X		
Rep. Joe Barnett	X		
Rep. Rod Bitney	X		
Rep. Sylvia Bookout-Reineke	X		
Rep. Roy Brown	X		
Rep. David Ewer	X		
Rep. Billie Krenzler	X		
Rep. Bob Lawson	X		
Rep. Gay Ann Masolo			X
Rep. Gary Matthews	X		
Rep. Joe McKenney	X		
Rep. Carolyn Squires	X		
Rep. Jay Stovall	X		
Rep. Carley Tuss			
Rep. Carol Juneau	X		
Rep. Cliff Trexler	X		

MONTANA HOUSE OF REPRESENTATIVES VISITORS REGISTER

DATE 3-22-99

BILL NO. SB 365

SPONSOR(S) _____

TYPE
PROPONENT (P) OPPONENT (O) INFORMATIONAL (I)

PLEASE PRINT

PLEASE CIRCLE	NAME	ADDRESS	REPRESENTING
☒ POI	Mike Foster	Helena	MT Contractors' Assoc.
☒ POI	Paul Thompson	Butte	Gilman Construction
☒ POI	Eugene Fendleran	Helena	MJ H & H C
☐ POI			
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ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

LEGISLATIVE TAPE LOG

COMMITTEE:

House Bus & Labor

DATE:

3/22/99

MINUTES

CONTENT NOTES

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Sen. Mc Ruth stated SB13
Vote to carryEx 4 A
SB13
294 18-0Law Council moves to amend
SB13. 18-0

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SB 365.

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Mike Foster. Mt Contractor Assn
Proposed Ex 4 243

436

Paul Thompson. Salmon Coast
Ruth Mt
Proposed.

470

Gene Pederson. Mt Fish &
Hamp & Dewey Cann.
Proposed.

481

Earl Schumacher. Mt Fish
Contractor
Proposed.

490

Don Watterly - Mt Contractors
Assn.
Proposed.

LEGISLATIVE TAPE LOG

COMMITTEE: House Bus & School

DATE: 3/22/99

MINUTES

CONTENT NOTES

009	Exp 1, B SB 365	no opponents Euler questions John Andrews - dept of Labor - / Henderson
49		Spencer questions John Andrews Moll Jensen " Moll
147		Euler questions John Andrews
161		Sen. Moll asked SB 365 Sitany is carry on floor
200	SB 365 18-0	Euler moves to concur SB 365
248	SB 271	Sen. Taylor SB 37 enters SB 271 Exp 4
416		Gulley Johnson State Dir. Mt. Dept of Ind. Bureau's proponent Exp 5
000	Cape 26	Dead Jeffin - Mt. Detail Area proponent
18		Sen. Nyes - Society of Bus Ment proponent



AN ACT CLARIFYING THE SCOPE OF CONSTRUCTION SERVICES PERFORMED ON A PUBLIC WORKS CONTRACT FOR WHICH THE PREVAILING RATE OF WAGES MUST BE PAID; AMENDING SECTIONS 18-2-401 AND 18-2-403, MCA; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 18-2-401, MCA, is amended to read:

"18-2-401. Definitions. Unless the context requires otherwise, in this part, the following definitions apply:

(1) A "bona fide resident of Montana" is a person who, at the time of employment and immediately prior to the time of employment, has lived in this state in a manner and for a time that is sufficient to clearly justify the conclusion that the person's past habitation in this state has been coupled with an intention to make it the person's home. Sojourners or persons who come to Montana solely in pursuance of any contract or agreement to perform labor may not be considered to be bona fide residents of Montana within the meaning and for the purpose of this part.

(2) "Commissioner" means the commissioner of labor and industry provided for in 2-15-1701.

(3) (a) "Construction services" means work performed by an individual in construction, heavy construction, highway construction, and remodeling work.

(b) The term does not include:

(i) engineering, superintendence, management, office, or clerical work on a public works contract;

or

(ii) consulting contracts, contracts with commercial suppliers for goods and supplies, or contracts with professionals licensed under state law.

(4) "Department" means the department of labor and industry provided for in 2-15-1701.

(5) "District" means a prevailing wage rate district established as provided in 18-2-411.

(6) "Heavy and highway construction wage rates" means wage rates, including fringe benefits

for health and welfare and pension contributions, that meet the requirements of the Employee Retirement Income Security Act of 1974 and other bona fide programs approved by the United States department of labor and zone pay and travel allowance that are determined and established statewide for heavy and highway construction projects, such as alteration or repair of roads, streets, highways, alleys, runways, trails, parking areas, or utility rights-of-way, staging yards located on or off the right-of-way, or new or reopened pits that produce aggregate, asphalt, concrete, or backfill when the pit does not normally sell to the general public.

(7) "Nonconstruction services" means work performed by an individual, not including management, office, or clerical work, for:

- (a) the maintenance of publicly owned buildings and facilities, including public highways, roads, streets, and alleys;
- (b) custodial or security services for publicly owned buildings and facilities;
- (c) grounds maintenance for publicly owned property;
- (d) the operation of public drinking water supply, waste collection, and waste disposal systems;
- (e) law enforcement, including janitors and prison guards;
- (f) fire protection;
- (g) public or school transportation driving;
- (h) nursing, nurse's aid services, and medical laboratory technician services;
- (i) material and mail handling;
- (j) food service and cooking;
- (k) motor vehicle and construction equipment repair and servicing; and
- (l) appliance and office machine repair and servicing.

(8) "Project location" means the construction site where a public works project involving construction services is being built, installed, or otherwise improved or reclaimed, as specified on the project plans and specifications.

~~(8)~~(9) "Public works contract" means a contract for construction services or nonconstruction services let by the state, county, municipality, school district, or political subdivision in which the total cost of the contract is in excess of \$25,000.

(10) "Special circumstances" means all work performed at a facility that is built or developed for

a specific Montana public works project and that is located in a prevailing wage district that contains the project location or that is located in a contiguous prevailing wage district.

~~{9}(11)~~ (a) "Standard prevailing rate of wages" or "standard prevailing wage" means:

(i) the heavy and highway construction wage rates applicable to heavy and highway construction projects; or

(ii) those wages, other than heavy and highway construction wages, including fringe benefits for health and welfare and pension contributions, that meet the requirements of the Employee Retirement Security Act of 1974 and other bona fide programs approved by the United States department of labor and travel allowance that are paid in the district by other contractors for work of a similar character performed in that district by each craft, classification, or type of worker needed to complete a contract under this part. In each district, the standard prevailing rate of wages must be computed from a weighted average wage rate based on all of the hours worked on work of a similar character performed in the district unless the survey of employers in the district does not generate sufficient data. If the survey produces insufficient data, the rate may be established by the use of other information or methods that the commissioner determines fairly establish the standard prevailing rate of wages. The commissioner shall establish by rule the method or methods by which the standard prevailing rate of wages is determined. The rules must establish a process for determining if there is insufficient data generated by a survey of employers in the district that requires the use of other methods of determining the standard prevailing rate of wages. The rules must identify the amount of data that constitutes insufficient data and require the commissioner of labor to use other methods of determining the standard prevailing rate of wages when insufficient data exists. The alternative methods of determining the prevailing rate of wages must provide for review and the incorporation of data from work of a similar character that is conducted as near as possible to the original district.

(b) When work of a similar character is not being performed in the district, the standard prevailing rate of wages, including fringe benefits for health and welfare and pension contributions, that meets the requirements of the Employee Retirement Security Act of 1974 and other bona fide programs approved by the United States department of labor and the rate of travel allowance must be those rates established by collective bargaining agreements in effect in the district for each craft, classification, or type of worker needed to complete the contract.

~~(10)~~(12) "Work of a similar character" means work on private or commercial projects as well as work on public projects."

Section 2. Section 18-2-403, MCA, is amended to read:

"18-2-403. Preference of Montana labor in public works -- wages -- tax-exempt project -- federal exception. (1) In every public works contract, there must be inserted in the bid specification and the public works contract a provision requiring the contractor to give preference to the employment of bona fide residents of Montana in the performance of the work.

(2) All public works contracts for construction services under subsection (1), except those for heavy and highway construction, that are conducted at the project location or under special circumstances must contain a provision requiring the contractor to pay:

(a) the travel allowance that is in effect and applicable to the district in which the work is being performed; and

(b) the standard prevailing rate of wages, including fringe benefits for health and welfare and pension contributions, that:

(i) meets the requirements of the Employee Retirement Income Security Act of 1974 and other bona fide programs approved by the United States department of labor; and

(ii) is in effect and applicable to the district in which the work is being performed.

(3) In every public works contract for heavy and highway construction, there must be inserted a provision to require the contractor to pay the heavy and highway construction wage rates established statewide for ~~the project~~ heavy and highway construction services conducted at the project location or under special circumstances.

(4) All public works contracts for nonconstruction services under subsection (1) must contain a provision requiring the contractor to pay:

(a) the travel allowance that is in effect and applicable to the district in which the work is being performed; and

(b) the standard prevailing rate of wages, including fringe benefits for health and welfare and pension contributions, that:

(i) meets the requirements of the Employee Retirement Income Security Act of 1974 and other

bona fide programs approved by the United States department of labor; and

(ii) is in effect and applicable to the district in which the work is being performed.

(5) Transportation of goods, supplies, materials, and manufactured or fabricated items to or from the project location is not subject to payment of the standard prevailing rate of wages.

~~(4)~~(6) A contract, other than a public works contract, let for a project costing more than \$25,000 and financed from the proceeds of bonds issued under Title 17, chapter 5, part 15, or Title 90, chapter 5 or 7, on or after July 1, 1993, must contain a provision requiring the contractor to pay the standard prevailing wage rate in effect and applicable to the district in which the work is being performed unless the contractor performing the work has entered into a collective bargaining agreement covering the work to be performed.

~~(5)~~(7) A public works contract may not be let to any person, firm, association, or corporation refusing to execute an agreement with the provisions described in subsections (1) through ~~(4)~~(6) in it, provided that in public works contracts involving the expenditure of federal-aid funds, this part may not be enforced in a manner as to conflict with or be contrary to the federal statutes prescribing a labor preference to honorably discharged veterans of the armed forces and prohibiting as unlawful any other preference or discrimination among citizens of the United States.

~~(6)~~(8) Failure to include the provisions required by 18-2-422 in a public works contract relieves the contractor from the contractor's obligation to pay the standard prevailing wage rate and places the obligation on the public contracting agency."

Section 3. Effective date -- applicability. [This act] is effective July 1, 1999, and applies to contracts entered into on or after [the effective date of this act].

- END -